

IN THE SUPREME COURT OF THE STATE OF NEVADA

DARRELL R. ESCALANTI,
Appellant,
vs.
BRIAN WILLIAMS, WARDEN,
Respondent.

No. 63536

FILED

JAN 15 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malme
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of the district court dismissing a post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Nancy L. Porter, Judge.

Appellant Darrell Escalanti contends that the district court erred by dismissing his petition as untimely because he established good cause for his delay. *See* NRS 34.726(1). Application of the procedural default rule in NRS 34.726 is mandatory and cannot be disregarded by the district court. *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005); *State v. Haberstroh*, 119 Nev. 173, 180, 69 P.3d 676, 681 (2003). Escalanti filed his petition more than fourteen years after the district court entered the judgments of conviction which

form the basis for his petition.¹ Therefore, the petition is untimely. NRS 34.726(1).

In order to overcome this procedural bar, Escalanti has the burden of demonstrating: (a) good cause for his failure to present the claim in a timely manner and (b) actual prejudice to the petitioner. See NRS 34.726(1). Good cause may be demonstrated by showing ineffective assistance of counsel or an impediment external to the defense such as a factual or legal basis for a claim that was not reasonably available or interference by officials making compliance impracticable. *Hathaway v. State*, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). However, good cause arguments must be made in a timely fashion and are also subject to the procedural default rules. *Id.*

Escalanti contends that the Supreme Court's recent opinions in *Lafler v. Cooper*, 566 U.S. ___, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 566 U.S. ___, 132 S. Ct. 1399 (2012); and *Padilla v. Kentucky*, 559 U.S. 356 (2010), establish a previously unavailable rule of law that excuses his failure to file a timely petition because his claim was not reasonably available before these cases were decided.² However, Escalanti fails to

¹Escalanti did not appeal from either of the judgments of conviction which were entered on February 11, 1998, and April 7, 1998. His petition was filed on August 6, 2012.

²To the extent that Escalanti argues that the Supreme Court's opinion in *Martinez v. Ryan*, 566 U.S. ___, ___, 132 S. Ct. 1309, 1315 (2012), excuses his procedural default, that case involved a claim of
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explain how his claim of ineffective assistance of counsel was previously unavailable or why it is now available under the aforementioned cases. The Supreme Court has held that its opinion in *Padilla* “does not have retroactive effect.” *Chaidez v. United States*, 568 U.S. ___, ___, 133 S. Ct. 1103, 1105 (2013). Therefore, the Supreme Court has not provided a new claim or remedy to petitioners like Escalanti who pleaded guilty before 2010. Furthermore, Escalanti filed his petition more than two years after the Supreme Court issued its opinion in *Padilla* and he has failed to establish good cause for his two-year delay. See *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506. Escalanti also argues that the Supreme Court’s recent opinions in *Lafler* and *Frye* “radically” changed the law concerning ineffective assistance of counsel by making it “clear that a defendant is entitled to effective assistance of counsel prior to his plea.” In light of the Supreme Court’s own declarations that this principle has been firmly established in federal law since 1985, we disagree with Escalanti. See *Frye*, 566 U.S. at ___, 132 S. Ct. at 1405 (“*Hill* [*v. Lockhart*, 474 U.S. 52 (1985)] established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*.”); *Lafler*, 566 U.S. at ___, 132 S. Ct. at 1384 (“In *Hill*, the

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ineffective assistance of post-conviction counsel. Because Escalanti does not allege the ineffective assistance of post-conviction counsel, *Martinez* does not excuse his procedural default.

Court held the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” (internal quotation marks omitted)). Escalanti did not establish good cause for his delay in filing his petition and we conclude that the district court did not err by dismissing it under NRS 34.726. Accordingly, we

ORDER the judgment of the district court AFFIRMED.³

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

cc: Hon. Nancy L. Porter, District Judge
Terrence M. Jackson
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk

³Although we filed the fast track briefs submitted by the parties, they fail to comply with the Nevada Rules of Appellate Procedure. Neither brief is double-spaced. See NRAP 3C(h)(1); NRAP 32(a)(4). Counsel for the parties are cautioned that the failure to comply with all applicable rules in the future may result in the imposition of sanctions. See NRAP 3C(n).